

Land Dispute Settlement Mechanisms: Is Inaccessibility A Source Of Village Land Disputes In Morogoro?

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Abstract- In Tanzania there are laid down land dispute settlement mechanisms which at all falls have legal backup. The rationale behind their establishment is to the effect that anyone who claims an interest over land has to knock the doors of the judicial holy temples for the redress. There is no dispute that land disputes at a village level are in existence despite having these mechanisms. However, this paper focuses on whether inaccessibility to these land dispute settlement mechanisms may be one of the sources for accelerated land disputes in Morogoro Region. Without prejudice to the above, this paper has examined the conflict theory in relation to the legal frame work in Tanzanian context. In so doing, laws applicable in Tanzania in respect to land matters particularly those vesting land dispute settlement mechanisms with force and validity have been examined. Notwithstanding the above, land dispute settlement mechanisms have been discussed in terms of establishment, composition, operation and sometimes their link in the course of administering justice in the context of quasi judicial bodies (particularly Tribunals) and the judicial bodies (particularly the High Court of Tanzania and the Court of Appeal of Tanzania) as land disputed mechanisms with exclusive powers to do justice over land matters. Furthermore, this paper has provided for highlights from the legal point of view, (though with no conclusive intimation) that in the course of operation reveal that land dispute settlement mechanisms seem inaccessible, thus the likelihood as to the persistence of solving land disputes through a self help between individual and groups may be at a high dividing line.

I. INTRODUCTION

Real property ownership particularly land, has over ages, been accompanied with struggle in acquiring and inconsistencies in possessing it. The reason is not far to trace. It is simply because land touches every aspect of human survival.¹ This

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¹ Tenga, W.R and Mramba, S.J., (2014), *Theoretical Foundations of Land Law in Tanzania*, 1st Ed. LawAfrica Publishing (T) Ltd, Dar Es Salaam, p.169

tussle therefore, all over the world, comes with disputes emanating from, though not limited to land allocation and ownership, land demarcation and possibly a mechanism to settle the disputes in case of any legal flaw may sometimes accelerate the said land conflicts. Thus a need for a proper mechanism to settle the said intricacies through legal mechanisms is of paramount importance for the purpose of harmony and quiet enjoyment to the land. Tanzania, with her people is not far from this position in her legal jurisprudence. There are bodies vested with power to allocate land, demarcate and settle any dispute arising therefrom. That said, Morogoro as one of Tanzanian Regions is entrusted with legal bodies vested with powers to settle land disputes. Basing on this position, this paper intends to discuss on what laws govern land matters in Mainland Tanzania, mechanisms vested with powers to settle land disputes and whether they are accessible enough to warrant a right quasi judicial operation vested to the underlying mechanisms. The focus is in Morogoro Region.

II. THEORETICAL AND LEGAL FRAMEWORK ON LAND DISPUTE SETTLEMENT IN TANZANIA

2.1 The Conflict Theory

The concept of land disputes worldwide is not new. It is linked with a conflict theory propagated by Karl-Max, a German Scholar and a revolutionist by 1818 to 1883 who among other things, came with an assumption that economic organization, especially the ownership of property, determines the organization of the rest of a society.² He was of the view that struggle for ownership of the scarce resources through class structure inherent in the economic organization is likely to create revolutionary class conflicts. It is from the above assumptions that through bipolar of the exploited class awareness of their true interests is gained thus form an organization to overturn the dominant class property holding class. That is to say, the cornerstone of the conflict theory is all about distribution of the scarce resources including property ownership and power. To be more precise, in Tanzanian jurisprudence, the term property includes land.³ This position was also shared in Tanzania, in the

² Turner. H. J., (2011), *The Structure of Sociological Theory*, 1st Ed. Rawat Publications, New Delhi, p. 134

³ See Tenga, W.R and Mramba, S.J., (2014), *Theoretical Foundations of Land Law in Tanzania*, 1st Ed. LawAfrica Publishing (T) Ltd, Dar Es Salaam, p.22; See also Rwegasira, A., (2012), *Land As a Human Right: A History of*

case of *Attorney General Vs Lohay Akonaay and Joseph Lohay*.⁴ Now, having such conflicts in any Community, there must be legally binding instruments to resolve the said disputes by declaring the rights of each party to the controversy, either on ownership or any related interest to the property. In Tanzania it is well confirmed that the categories of land disputes at a village level involve villagers amongst themselves, villagers against the investors and villagers against the government authorities.⁵ This means existence of land disputes at a village level is not in dispute. The issue at hand is whether the inaccessibility of the set legal machineries is one of the causes for the persisting land conflicts at a village level.

2.2 The Laws Governing Village Land Ownership and Land Dispute Settlement

Land at a village level in Tanzania has multiple laws governing it from the time an individual, a group of people, organization or the government acquires it to the time it is used for the best interest of the occupier or sometimes when it is transferred to another interested party as the case may be. The legal regimes guarantee an individual or any interested party over land with both substantive and procedural rights over land in the course of acquiring, using and even when transferring or assigning that right to another party. The legal framework imposes duties, procedures and rights to such a party who is either in occupation, usage or intends to transfer or assign the right one has over land. The same proposition applies to the village land in Mainland Tanzania. Various laws have been imposed to serve the purpose at a village level. These include the grand norm, Parent Acts, Subsidiary regulations. Policies have been included here though they possess no legal force, save when they are incorporated into the legal instrument as it is to the part of the Land Policy of 1995 within the Village Land Act and the Land Act.

The legal regimes move further to protect land rights of an interested party by setting down legal procedures where such rights over land are in conflict to each other or when it is the parties themselves who are in conflict over the village land. These laws are explained herein below.

2.2.1 The Constitution of the United Republic of Tanzania: ⁶

This is a mother law in Tanzania which guarantees every citizen with the right to own property. The right to own property is very old. Various philosophers have digested about it.

Land Law and Practice in Tanzania, 1st Ed. Mkuki na Nyota, Dar Es Salaam, p.44. See also Article 24 of the

Constitution of the United Republic of Tanzania providing for the right to property ownership.

⁴ *Attorney General Vs Lohay Akonaay and Joseph Lohay* (1995) TRL 80 (CAT)

⁵ Speech of the Minister for Lands, Housing and Settlement Development issued in June 2015 before the National

Assembly when debating on the Annual Budget of 2015/2016, pp. 26 and 27; See also Speech of the Minister for Lands, Housing and Settlement Development issued in June 2016 before the National Assembly when debating on the Annual Budget, 2016/2017 pp. 73

⁶ Cap. 2 R.E 2002

Aristotle contended that the abolition of private property will mean that no man will be seen to be liberal and no man will ever do any act liberally, for it is in the use of articles of property that liberty is practiced.⁷ *John Locke* as well, puts it clearly that no man could ever have power over the life of another by right of property in land or possessions since it would always be sin in any man of estate to let his brother perish for want of affording him relief out of his plenty; for justice gives every man a title to the product of his honest industry and the fair acquisitions of his ancestors descended to him, so charity gives every man a title to so much out of another's plenty as will keep him from extreme want, where he has no means to subsist otherwise.⁸

The Constitution of the land has not been far from the concepts above as it guarantees the right to the citizens to own property which includes land.⁹ It gives this right to own property and protects it in case this right is taken away from him. The Constitution provides two items over this right: that is the right to own property and the second item is the conditions on how that can be extinguished from an interested party. The latter provides for existence of the law which extinguishes that right and sets out a mandatory requirement for payment of prompt and fair compensation.¹⁰ The absence of the enshrined conditions entails the entire proceedings over this right a nullity. There is a litany of case laws supporting this proposition.¹¹ That being the case as per *Aristotle's* contention that if one is prohibited to own land as if his liberty is curtailed, likewise the Constitution guarantees every citizen to own property anywhere in Mainland Tanzania provided one complies to the laws. It is the same grandnorm that guarantees a duty to do justice to the Courts of law,¹² vested with such mandate in the course of resolving the said disputes.

2.2.2. The Land Act:¹³

The majority would erroneously think that this law does not have any application over the Village Land. Its application is of such vital role to the village land to an extent of declaring it supreme to the Village Land Act in case of any inconsistencies or conflict to the law.¹⁴ It is this law that maintains the notion that all land in Tanzania is a public land and is entrusted to the President as a trustee.¹⁵ This notion takes precedence to the village land. It is this law that gives the general categories of land

⁷ See A. Rwegasira, (2012), *Land as a Human Right: A History of Law and Practice in Tanzania*, 1st Ed., Mkuki na Nyota, Dar Es Salaam, pp.2-3 as he quoted *Aristotle* (1962): *The Politics* Penguin Books, para. 1261b 32.

⁸ A. Rwegasira, (2012), *Land as a Human Right: A History of Law and Practice in Tanzania*, 1st Ed., Mkuki na Nyota, Dar Es Salaam p. 3 as he quotes *J.Locke* (1978): *Two Treatises of Government*, (Trans. Cambridge Bibliographical Society, 1952), J.M. Deut & Sons Ltd.

⁹ See Article 24 of Cap. 2 R.E 2002.

¹⁰ See Article 24(2) supra

¹¹ See the case of *Attorney General v. Lohay Akonaay and Joseph Lohay* (1995) TLR 80 (CA),

¹² See Article 107A of Cap. 2 R.E 2002

¹³ Cap. 113 R.E 2002

¹⁴ See Section 181 *ibid*.

¹⁵ See Section 4(1) *ibid*.

in Mainland Tanzania as a general land, village land and reserved land.¹⁶ There is also a link on the underlying procedures upon which the transfer land is dealt with, either from the village to general land or reserved or the vice versa.¹⁷ There are instances where the village land legal systems apply mutatis mutandis with what is applied in this law.¹⁸ As if it is not enough, the law provides that in case of contradiction as regards all matters of land in respect to laws applicable to the subject matter the Land Act stands to prevail. It is loudly provided that the Land Act shall apply to all land in Mainland Tanzania and any provisions of any other written law applicable to land which conflict or are inconsistent with any of the provisions of the Land Act, to the extent of the conflict or inconsistency, shall cease to be applicable to land or any matter connected to with land in Mainland Tanzania.¹⁹

Furthermore, the Land Act is applicable over the village land where there is a dispute on boundaries and the Minister is bound to appoint an Inquiry. The procedures to be applied are obtained from the Land Act under Section 18 of the Land Act. It is worthy emphasizing here that the Land Act therefore applies to the village land to the extent the Land Act provides thereto and the extent that any other law conflicts with it.

2.2.3. The Land Acquisition Act:²⁰

The President being a trustee of land in Mainland Tanzania is entitled to acquire land anywhere in Tanzania for public purpose. The term *public purpose* connotes any of the following instance: exclusive Government use, for general public use, for any Government scheme, for the development of agricultural land or for the provision of sites for industrial, agricultural or commercial development, social services or housing; anything connected with sanitary improvement of any kind, including reclamations; anything connected with the laying out of any new city, municipality, township or minor settlement or the extension or improvement of any existing city, municipality, township or minor settlement; connection with the development of any airfield, port or harbour; connection with mining for minerals or oil; for use by any person or group of persons who, in the opinion of the President, should be granted such land for agricultural development.²¹

The president when so empowered to acquire land, he is guided by various principles which include but not limited to public interest,²² public utility or the interest of public economy. This therefore requires an approval by the National Assembly and the notice to issue thereto to the government gazette for protecting the interest of either party to the land.

¹⁶ See Section 4(4) *ibid*

¹⁷ See Section 5 *ibid*

¹⁸ See Section 31(4), 57(4), 58(2), 58(3), 18 *ibid*

¹⁹ See Section 181 *supra*

²⁰ Cap. 118 R.E 2002

²¹ See Section 4(1) of Cap.118 R.E 2002

²² See the Case of *Said Juma Shekimweri Vs AG*, Misc. Civil Case No. 3 of 1996 High Court of Tanzania at DSM (unreported), *Bp Bhatt and Another Vs Habib Versi Rajan* (1958) E.A 536, See also *Agro Industries Vs AG* (1994) T.L.R 43; *Patman Garments Industries Ltd v Tanzania Manufacturers* [1981] TLR 303., which discusses on the controversy of the term public interest.

In Tanzanian jurisprudence, it is not a new phenomenon as it is dully guided in our land Acts. For example: Section 4(1) and (2),²³ the President may acquire village to a transfer land on the basis of public interest. The Land Acquisition Act sets a mandatory requirement of notice to the affected parties and a requirement of prompt and fair compensation for unexhausted improvements.²⁴

2.2.4 The Village Land Act:²⁵

This is the Parent Act which governs village land administration and village land management in detail. It covers various aspects such as important definitions and keys terms which apply within the village land.²⁶ It also comprised of the fundamental principles of the National Land Policy.²⁷ It covers on the other hand the discretionary powers of the President as a trustee of all land in Mainland Tanzania over the village land. It avails the President with such wide powers to an extent that the President can transfer the village land when he is minded so to do for public interest.²⁸ This Act elaborates what exactly should fall within the ambit of the village land which this law stands to protect.²⁹ This means it highlights the parameters within which the village land falls. The bodies which are vested with powers to manage and administer the village are dully established and their underlying obligations thereto.³⁰ The categories of village land are shown and it is this law which shows the land rights in the village and how they are registered to the relevant authorities. These are commonly known as the attributes of customary right of occupancy.³¹ Similarly it highlights the right person with whom such land rights are vested to. These are mentioned to include, the villagers who are citizens and residents within the village, the Non-villagers though citizens but not residents at the material time but have prospects of being residents, non-village organizations and non citizens. The law shows clearly on how each party may have vested interest over the village land. It goes further to highlight adjudication of interest in village land and its underlying procedures.³² The law anticipated that in the presence of any vested interest over land there must be disputes which shall require a mechanism to resolve them. This is not different from what Fimbo (2004) once said that historically land has always been an arena of struggle between the contending forces.³³ So the Parliament anticipating this has enacted provisions for covering this aspect in details.³⁴ Lastly the law

²³ Cap. 114 R.E 2002

²⁴ See Section 6, 7 and 11 *loc. cit.* fn. 21

²⁵ Cap. 114 R.E 2002

²⁶ See Section 2 *ibid*

²⁷ See Section 3 *ibid*

²⁸ See Section 4 (1) of the Village Land Act, Cap. 114 R.E 2002

²⁹ See Section 7 *ibid*.

³⁰ See Section 8 *supra*

³¹ See L.A. Willy, (2003), '*Community-based land tenure management, Question and Answers about Tanzania's Village Land Act, 1999*' A Paper issued by the International Institute for Environment and Development, Drylands Programme, Issue No.120 of 2003 p. 34; See also Ss. 12, 18, 19,27 and 29 of Cap. 114 R.E 2002

³² See Section 48 to 59

³³ See G.M.Fimbo (2004), *Land Law Reforms in Tanzania*, 1st Ed. Dar Es Salaam University Press Ltd, Dar Es Salaam p.2

³⁴ See Sections 60-63 of Cap. 114 R.E 2002

covers for miscellaneous provisions with penal offences and the discretionary powers of the Ministers to issue regulations thereto. It is the Village Land Act which has imputed in its provisions other laws which may apply at a village level including the Forest Act, National Parks Act, Ngorongoro Conservation Act, Wildlife Conservation Act, Marine Parks and Reserves Act, High Way Act, Public Recreation Grounds Act and the Land Acquisition Act.³⁵ The villagers are vested with powers to declare part of their village area to fall into the demand of these laws.

2.2.5. *The Local Government (District Authorities) Act.*³⁶

This is a very important law that enables the village governments to govern and to make by-laws in relation to land ownership. This is to say the law establishes village authorities which are vested with powers to administer and or manage the village land in Mainland Tanzania. It provides for the composition of the village authorities and the meetings of the village government as well the bindingness of the issued decisions thereof.

2.2.6. *The Land Use Planning Act.*³⁷

This Act repeals Cap. 116 R. E 2002. It establishes the procedures for the preparation, administration and enforcement of land use plans. It is crucial in the execution of land use plans countryside.³⁸ The law aims at improving local access to land and control of its natural resources. It employs a participatory approach where villagers themselves stand to reduce land conflicts by themselves within their boundaries between the land users. It assists the villagers to improve security of tenure by certification of village land. It employs the Village Council as a planning authority.³⁹ It is this Act which puts in force various strategies such as The Property and Business Formalization Programme (commonly known as MKURABITA). Through this programme, the certificates of customary rights are issued through systematic adjudication approach. Through this experience in Mvomero District, Morogoro Region, the District Participatory Land Use Management team and the Village Land Use Management Committee, six villages have been taken as a pilot study.⁴⁰ Similarly under the National Strategy for Growth and Reduction of Poverty (commonly known as MKUKUTA II) with its five years Plan from 2011/2012-2015/2016 identifies the limited access to secure land rights as one of the crucial constraints to Tanzania's accelerated growth and development.⁴¹

³⁵ Section 6 (1) of Cap. 287 R.E 2002

³⁶ Cap. 287 R.E 2002

³⁷ Act No. 6 of 2007

³⁸ The United Republic of Tanzania: *Strategic Plan for Implementation of Land Laws (SPILL)*, 30th Version issued on 30th January 2014 by the Ministry of Lands, Housing and Human Settlement Development p. 10

³⁹ G. Mango and D.Kalekezi, (2011), *The Study to Develop a Strategy for Establishing Cost Effective Land Use Plans in Iringa and Njombe Regions: A Report* funded by the National Land Use Planning Commission of the United Republic of Tanzania p.10

⁴⁰ Supra p. 22

⁴¹ The United Republic of Tanzania: *Strategic Plan for Implementation of Land Laws (SPILL)*, 30th Version issued on 30th January 2014 by the Ministry of Lands, Housing and Human Settlement Development pp.13-15

Other projects of the like include Public-Private Partnership, Kilimo Kwanza (2013), Big Results Now (2013/2014) and decentralization by devolution (1990).⁴² This is one of the instances where the law applies.

2.2.7. *The Land Disputes Courts Act.*⁴³

It is a very important law which sets out the procedures for the formation and operation of the land dispute settlement machineries. These machineries include the Village Land Council, the Ward Tribunal, the District Land and Housing Tribunal, the High Court of Tanzania (Land Division) and the Court of Appeal of Tanzania. It has been established that Mainland Tanzania has established almost 49 District Land and Housing Tribunals and it is only 42 tribunals which were in operation.⁴⁴ It was established that out of 19,879 cases that were filed in these tribunals only 9,831 cases were settled.⁴⁵ The current status as it was issued in June 2015, shows that there only 47 District Land and Housing Tribunal which are in operation so far after five tribunal were placed to operate that is Mpanda, Kyela, Ngara, Karagwe and Ngorongoro.⁴⁶ The total number of 13,338 cases were filed making a total of 31,782 cases are pending in these tribunal whereas only 13,749 cases were concluded leaving 18,033 pending in these tribunals.⁴⁷ The most recent Government Notice has pronounced other 47 District Land and Housing Tribunals though not in operation yet.⁴⁸

The law sets out the procedure on how to enforce land rights in case of disputes. The establishment of these tribunals is in compliance to the Report of the Presidential Commission of Inquiry on Land Matters which proposed among other things that there should be some kind of an independent, impartial body specially for resolving land disputes.⁴⁹

2.2.8. *The Village Land Regulations 2001.*⁵⁰

These are made under Section 65 of the Village Land Act where the Minister is empowered to make regulations generally

⁴² Ibid p.14-16

⁴³ Act No. 2 of 2002 as it was rectified by the Government Notice No. 225 of 8/8/2003: Entitled Rectification of Printing Errors (The Land Disputes Courts Act) Order 2003. For more clarification see the case of *Lweshabura Mzinja Vs Julieta Jacob, Misc. Land Appeal No. 7 of 2005, High Court of Tanzania (Land Division –as it then was) at Dar Es Salaam*, p.3

⁴⁴ See the United Republic of Tanzania, *Budget Speech*, 2014/2015 Financial Year, Dodoma, Ministry of Lands, Housing and Settlement, 2014.

⁴⁵ See the United Republic of Tanzania, *Budget Speech*, 2013/2014 Financial Year, Dodoma, Ministry of Lands, Housing and Settlement, 2013

⁴⁶ See the United Republic of Tanzania, *Budget Speech*, 2015/2016 Financial Year, Dodoma, Ministry of Lands, Housing and Settlement, 2015 p. 45.

⁴⁷ See the United Republic of Tanzania, *Budget Speech*, 2015/2016 Financial Year, Dodoma, Ministry of Lands, Housing and Settlement, 2015 p. 45.

⁴⁸ See The Government Notice No. 545 of 2016

⁴⁹ See RPCILM p. 105

⁵⁰ Government Notice No. 86 of 2001 published on 04/05/2001

for the better carrying out into effect the purposes of the parent Act. It contains the forms from Village Land form No. 1 to 49. It contains the procedures for village land adjudication committee as it is seen on Part VI of the Regulations. It highlights the procedures for compensation claims as it seen on Part III of the regulations and the issue of joint village land use agreement.

III. LAND DISPUTE SETTLEMENT MACHINERIES IN MAINLAND TANZANIA

Land disputes have been in place due to various circumstances which have now been the determinant of the mechanism to be employed to settle a particular dispute in Tanzania. These have included boundaries over the village land,⁵¹ issues emanating from land adjudication in the course of granting a certificate of customary right,⁵² or in any matter which the parties deem a controversy over land which may include any other interest over the village land.⁵³ It is the nature of the dispute which determines what mechanism can be employed to resolve the land matter at hand. For the purpose of this study, the mechanism of land dispute settlement at village level is categorized into two parts: *Judicial* and *Non Judicial* mechanisms of dispute settlement. The former is so named on a reason that the parties to the dispute are bound to undergo ordinary court processes as to sue any other party of whose decision aggrieves his interests;⁵⁴ while the latter is an administrative procedure which is not final and conclusive to the matter in dispute and does not involve litigation before the Courts of law or quasi judicial bodies as the case may be.

i. Non-Judicial Mechanism:

a) Mediation through the Mediator Appointed by the Minister

This is established where there is a dispute between the village using the village land with a person or body which is in occupancy with the land or boundaries demarcated as village land before the Village Land was in force or the village is in dispute over the village land occupied under a granted right of occupancy, occupied as a general land, occupied by another village land, or is occupied as a reserved land or is declared an urban area.⁵⁵ Where there is such a disputed over the village land, the Minister responsible for lands may appoint a mediator whose role is to persuade the parties to reach a compromise over the boundaries. In case this comes out successful, then the dispute stands concluded as per the agreement. In case the matter is not resolved then the second approach is resorted to as an inquiry.

b) An Inquiry:

This is categorized into two parts: *The first category of Inquiry*: This takes place where the Mediator under Section 7(2) (a) of the Village Land Act, has failed to mediate the parties on the matter in dispute. The Minister therefore appoints an Inquiry

upon receiving the report on mediation failure.⁵⁶ In this case the Minister is bound to comply to Section 18 of the Village Land Act and the Minister may appoint one or two persons to hold an inquiry. When the Minister deems it just depending on the nature and seriousness of the matter may appoint a Judge of the High Court of Tanzania to hold such an inquiry.⁵⁷ The advice on what judge should hold an inquiry is given by the Chief Justice of Tanzania whose advice binds the Minister as regards the appointment.

The inquiry shall be held at any time, (with terms of reference from the Minister), within a month from the date of appointment and at any venue within the discretion of the Minister. It is set that the inquiry shall be open to the public save when the chairperson to the inquiry deems otherwise for the interest of the evidence to be provided.⁵⁸ Each party to the inquiry shall be represented and the inquiry shall make sure each party is substantively heard.

The procedures of conducting the inquiry are left to the discretion of the person chairing the inquiry. The principles guiding the proceedings shall base on the rules of natural justice.⁵⁹ In this case, the person holding the inquiry has powers like that of the Judge of the High Court, witnesses are summoned, production of documents is required, and witnesses are examined under oath.

The authenticity of the proceedings under the inquiry take precedence against any person as it is to judicial proceedings. The instances like perjury, subordination of perjury, false statements by interpreters, fabricating evidence, false swearing, deceiving witness, destroying evidence, conspiracy to defeat justice and interference with witnesses with justice, contempt in the course of conducting the proceedings and preventing or obstructing the service or the execution of the process are treated at the inquiry as it is done under ordinary court proceedings.⁶⁰

The next step under inquiry is report preparing as to the outcome of the inquiry. The report is submitted to the Minister for Lands. It contains advice and recommendations as per terms of reference directing what interested parties to the dispute must abide to.⁶¹

The last step shall be publishing the report of the Inquiry. In order to exonerate the publishing authority from liability, the report is protected under the defence of qualified privilege.⁶² The rationale being protecting any acts or omission from the report of which any statement from it was done with good faith and that the publishing authority has some legal, moral or social duty to publish it, provided that the publication does not exceed either in extent or matter what is reasonably sufficient for the occasion.⁶³ It is interesting to note here, that, the term public interest is in place again, availing the second chance opportunity to the

⁵¹ See Section 7(2) of the Village Land Act

⁵² See Section 48 *ibid*

⁵³ See Section 62 *ibid*

⁵⁴ See Section 8(12) *ibid*

⁵⁵ See Section 7(2) *ibid*

⁵⁶ See Section 7(2) (b) and Section 8(8) (d) of the Village Land Act, Cap. 114 R.E 2002

⁵⁷ See Section 18(2) of the Land Act Cap. 113 R.E 2002

⁵⁸ See Section 18(4) *ibid*

⁵⁹ See Article 13(6)(a) of Cap. 2 R.E 2002

⁶⁰ See Section 18(8) of the Land Act and Sections 102 to 110, 114 and 114A of the Penal Code Cap. 16 R.E 2002

⁶¹ See Section 18(9) of the Land Act, Cap. 113 R.E 2002

⁶² See Section 43(a) of the News Paper Act, Cap. 229 R.E 2002

⁶³ See Section 8(10) of the Land Act, Cap. 113 R.E 2002

Minister not to accept the recommendation or the advice of the Inquiry in the matter in dispute.⁶⁴ The law does not define what that public interest is needed to be protected by the Minister in this sense.

The *Second Category of Inquiry* is made under Section 8(8) (d) of the Village Land Act. This happens where there is a dispute between the Village Council and Village Assembly or the dispute between the Village Council and the villagers who do not form a minimum of one hundred villagers. The gist of the dispute must be the allegations by the villagers or the village assembly as above mentioned to the effect that the village council is not exercising the functions of managing the village land as per the Village Land Act.

The other reason that may be advanced as an allegation to the village council warranting an inquiry is that it does not operate as per principles governing the trustee in the course of managing the village land.⁶⁵ The principles governing the trustee are well established under the law.⁶⁶ These include but not limited to any evidence that there is fraud and dishonesty by the Village Council or if it is adjudged bankrupt under any written law or enters into any agreement or scheme of composition with his creditors, or takes advantage of any law for the benefit of his debtors.⁶⁷ On the other hand, if it happens that the Registrar-General has decided to exercise his duty of investigating the trustee for use or misuse of any property vested in the trustee. The Registrar-General may investigate or authorize any fit and proper person to investigate on his behalf into the trustee. All these circumstances prove that the trustee who in this case, the Village Council, is against the principles of trusteeship.

Last, the inquiry may be conducted if there is an allegation from the Village Assembly or at least one hundred villagers that the village council is against any other laws operating over the village land in Mainland Tanzania.

Under these circumstances, the District Council after having received the complaints may recommend to the Commissioner for Lands that the inquiry be appointed under section 18 of the Land Act, to investigate the complaint and make recommendation. The procedures under category one of the inquiry applies in this case as well.⁶⁸

The inquiry may recommend to the Minister for Lands that the management of the village land be removed from the jurisdiction of the village council subject of inquiry either for a fixed term or an intermediate period and transferred to either the district council in the area where whose village council is being inquired or the Commissioner.

After the Inquiry has completed the investigation, with the results that the village council is at fault, the Commissioner shall take all such actions to re-establish the lawful management of that village land and proper allocation of the interests in that village land. This process is with such hurdles as if the Commissioner is an allocating authority or appointing authority of the village council at the village level.

⁶⁴ See Section 7(5) of the Village Land Act, Cap. 114 R.E 2002

⁶⁵ See Section 8(2) Supra

⁶⁶ See Section 4 and 14 of the Trustees' Incorporation Act, Cap. 318 R.E 2002

⁶⁷ See Section 4.

⁶⁸ See Section 18 of the Land Act, Cap. 113 R.E 2002

c) Land Adjudication Committee

This is the body that deals with village land adjudication particularly where there is a need for demarcation to the village land before obtaining the certificate of customary right of occupancy. Where it is established that the need so arises and upon approval by the village assembly, a village land adjudication committee may be established of whose members are elected by the Village Assembly. The Committee consists of not less than six and not more than nine persons whom three of them should be women.⁶⁹ The tenure is three years time renewable for another term. The Chairperson of the Committee is appointed by the members of the committee amongst themselves. The quorum for the purpose of issuing a decision must be of four if the members are six of which half of the members shall be women and it is more than six but not exceeding nine, at least five members shall constitute a quorum of which two of them shall be women. As to control the proceedings, in case of any equal votes during decision making process, the Chairperson shall have a casting vote as well as an original vote and shall be vested with power to administer oaths and issues summons, notice order for attendance of any person as it may be necessary at the proceeding.

The Committee shall have the executive officer who is also termed as the village adjudication adviser.⁷⁰ It is this officer who keeps the records of the committee. The committee for that matter is vested with jurisdiction over all claims made during adjudication process and it is empowered to conduct a hearing by determining its own procedures after a notice has been issued and published in prominent places in the village.⁷¹ The rationale for the notice is to specify the adjudication area, to require any interested person to forward his claims and requiring any interested person to specify his boundaries within the adjudication area.

In the course of hearing, the Committee is governed by various principles. These include rules of natural justice.⁷² That being the case, the Committee is endowed to hear evidence which would not have been admissible in a court of law, call evidence of its own motion, use evidence contained in any official record or adduced in any other claim.

The Committee at a hearing is vested with power to mediate the parties through amicable settlement over the disputed land. After going through the proceedings the Committee is obliged to issue provisional adjudication records.⁷³ In case no appeal is preferred, the record shall be final and binding upon all the parties. The said record must be entered into the village register.

The adjudication committee determines the boundaries of the village land in interest for adjudication purpose, set aside or makes reservation to the rights of easement, issues any decision

⁶⁹ See Section 53(1) and (2) of the Village Land Act

⁷⁰ See Section 52(1) and 53(8) supra.

⁷¹ See the Village Land Regulations 2001-Village Land Form No. 46

⁷² See Section 53(9) *ibid.* See also the concept of natural justice from E.G.Mushi, (2014), *Administrative Law of Tanzania*, 1st Ed. Mzumbe University, Morogoro, pp.242 to 283

⁷³ See The Village Land Regulations, 2001 -Village Land Form No. 49; See also Section Section 54(6) of the Land Act, Cap. 114 R.E 2002

relating to customary law subject to village adjudication, advice the village adjudication adviser and safe guards the interest of the disadvantaged at village level in relation to land.

ii. Judicial Mechanism

a) The Village Land Council

The Village Land Council is under the Ministry of Local Government (District Authorities). It is responsible to the Director of the District Council. This body is established under Section 167(1)(e) of the Land Act to mean one of the Courts of law empowered to deal with land matters. The Village Land Act supports the proposition that the Village Land Council is the Court of law vested with powers to deal with land disputes.⁷⁴ The same proposition is provided for, under the Courts (Land Dispute Settlement) Act.⁷⁵ The Village Land Council is established by the Village Council within a given village upon approval by the Village Assembly.⁷⁶ Its composition consists of not less than five members and not more than seven members and contains not less than two members who shall be women. The integrity and knowledge of an individual are the criteria for one to become a member of the Village Land Council. Furthermore, the person must be resident within the village with the age of 18 years, a citizen of the United Republic of Tanzania who is mentally fit but not a member of the National Assembly neither should he be a Magistrate within the locality.⁷⁷ In the course of holding the meeting, the members amongst themselves elect one of the members to be the convener of the meeting and who will be the custodian of the records of the meeting. At the time of issuing a decision it will be by majority vote but in case of equal votes the convener shall have a casting vote. The complete quorum for the meeting shall be four members of whom at least one shall be a woman.

The Registrar of Villages shall be responsible for total administrative functions of the Village Land Council.⁷⁸ This means the Registrar shall be the Chief Executive of Village Land Councils. In Tanzania, this body is under the Ministry of Regional Administration and Local Government Authorities commonly known as TAMISEMI (Tawala za Mikoa na Serikali za Mitaa).

The Village Land Council is vested with two major powers: *Appellate capacity* and the *Mediation capacity*.

The Appellate Capacity: the first instance on appellate capacity is when the decision of the Village Adjudication Committee is challenged by any interested party aggrieved by the decision through appeal.⁷⁹ The decision so issued by the Committee may be challenged through appeal to the Village Land Council within a period of thirty days from the date provisional adjudication record was published by the Committee.⁸⁰ In the course of exercising such powers, the Council is with all the powers and shall comply with all the

procedures applicable to a village adjudication committee. It is as well empowered to amend the adjudication record, correct any error in the adjudication record and or direct that the village adjudication adviser conduct further investigation into the subject matter of appeal. For the best interest of justice when the Council deems it just, may call upon a person who is likely to be affected by the decision but has not appealed and avail him with an opportunity of being heard on appeal before the appeal is determined.⁸¹ It is interesting to note here that the decision issued thereto is appealable to the District Land and Housing Tribunal within the locality and it is done after the leave has been sought.⁸²

The second instance where the Village Land Council operates as an appellate body is under the process for *staying the suits*.⁸³ It is provided among other things that, if the consent of the Chairperson of the village adjudication committee or where the central adjudication is taking place, no person is allowed to institute any civil action or proceedings of any kind in relation to land adjudication until the adjudication record is final. Likewise where any action or proceeding has begun be it village adjudication or application for determination of the adjudication no proceedings may be instituted until the finality of the said proceedings. Any one aggrieved by the decision of the Chairman in this regard may appeal to the Village Land Council within fourteen days and may further appeal to the Court of Competent jurisdiction.⁸⁴

Mediation Capacity of the Village Land Council: The Council is purposely established for this main task when it falls within the hierarchy of the bodies established to settle land disputes. It is set as the lowest court with exclusive jurisdiction to settle land disputes.⁸⁵ The rationale of its establishment is to mediate the parties and thus assists them to arrive at mutually acceptable solution on any matter concerning land.⁸⁶ Similarly Act No. 2 of 2002 provides for the basic functions of the Council as to receive complaints from the parties in respect of land, convene the meeting for hearing the disputes thereof and lastly to mediate the parties.⁸⁷

The powers of the Village Land Council to operate as the mediating body are limited under Section 61 of the Village Land Act. It provides for *two* instances where the Village Land Council is bound to exercise its mediation capacity. *First*, when there is a joint village lands use agreement between the villages.⁸⁸ This agreement is entered between the village council and the other village council from another village concerning the use of the village by an individual, group of persons which was traditionally used by those groups and it is partly in one village and partly to the other village. The said agreement may be amended from time to time on mutual agreement. The procedure

⁷⁴ See 62(2)(e) of the Village Land Act.

⁷⁵ See Section 3(2)(a) of Courts (Land Dispute Settlement) Act, No.2 of 2002

⁷⁶ See Section 60(2) (a) and (b) of the Village Land Act

⁷⁷ See Section 60(5) supra

⁷⁸ See Section 23 of Cap.287 R.E 2002 and Section 6 (a) of Courts' (Land Dispute Settlement) Act, No.2 of 2002

⁷⁹ See Section 55(1) of the Village Land Act

⁸⁰ See Section 55 (1) and Section 54 (7) *ibid*.

⁸¹ See Section 55(4) *Supra*

⁸² See Section 55(5) *ibid*.

⁸³ See Section 59(1) *ibid*.

⁸⁴ See Section 59(1), (2) and (3) *ibid*.

⁸⁵ See Section 167(1) (e) of Cap. 114; Section 62(2)(e) of Cap. 114 and Section 3(1) and (2) of The Courts' (Land Dispute Settlement) Act, No. 2 of 2002.

⁸⁶ See Section 60(1) of the Village Land Act, Cap. 114 R.E 2002

⁸⁷ Section 7 of Act No.2 of 2002

⁸⁸ See Section 11 of the Village Land Act, Cap. 114 R.E 2002

for such agreement is well established.⁸⁹ In case of any dispute thereof, then Village Land Council may stand to mediate the parties to the agreement. *Second*, when there is a land sharing arrangements between the pastoralists and the agriculturalists.⁹⁰ This agreement is entered between the dual users of the village land that is the pastoralists and the agriculturalists. In case of any adjudication process in respect to the said and that both interested parties are still willing to use the said in duality an agreement may be entered in respect to joint use of the village land. In that agreement the rights to use the said land shall be established and the arrangements for resolving any disputes between them shall be set.⁹¹ That being the case the agreement shall be registered in the Village Land Register and the District Register. In case of any dispute therefore in respect to the agreement, the Village Land Council shall be vested with jurisdiction to mediate the parties thereto.

It is well settled that in both instances above explained (where the Village Council is vested with power to mediate the parties), in case mediation fails, the parties are entitled to refer the matter to the Courts of Competent jurisdiction.⁹² The courts of competent jurisdiction for this matter are the Ward Tribunal,⁹³ though the wording of these two laws on what should be the competent court of reference is still debatable depending on the pecuniary jurisdiction of these Courts preferred. It is established that the Court of Competent jurisdiction is accessed by way of reference. Still this sounds differently from the ordinary concept of the term reference which the legal proceedings are used to.⁹⁴

b) The Ward Tribunal

This body is under the control of the Ministry of Regional Administration Local Government and accountable to the Director of District Council of the locality. The Ward Tribunal has ordinarily been a body vested with the original jurisdiction to entertain land disputes. This body is governed by two laws in the process of functioning as a quasi-judicial body.⁹⁵ The members of the Tribunal are appointed by the Ward Committee and there shall be a Secretary to the Tribunal who also shall be appointed by the local government where the tribunal belongs with the

⁸⁹ See Section 11 *ibid*. In this case the Village Council of one village meets the interested groups for a meeting, and a draft of the agreement is prepared (taking into regard the present representation of interested groups), the district council has to be informed and lastly the Village Assembly of each village must receive the draft. If it is approved by the village Assemblies then it is signed.

⁹⁰ See Section 58 of the Village Land Act, Cap. 114 R.E 2002

⁹¹ See Section 58(1)(a),(b) of the Village Land Act, Cap.114 R.E 2002

⁹² See Section 62(1) of the Village Land Act

⁹³ See Section 9 of the Courts(Land Dispute Settlement)Act

⁹⁴ There are various categories of reference that is a reference from the Subordinate Court to the High Court of Tanzania, a reference from a taxing master to the High Court Judge in respect to the bill of cost, a reference from the single justice of appeal to the full bench or reference on constitutional matter. See F. Mirindo (2014), *Administration of Justice in Mainland Tanzania*, 1st Ed.Law Afica, pp.662 to 665

⁹⁵ See Section 3 The Ward Tribunal Act, Cap. 206 and Section 10 of the Land Dispute Courts Act, No.2 Of 2002

recommendation of the Ward Committee.⁹⁶ In the course of exercising its powers, the Tribunal is not bound by any rules of evidence or procedure applicable to any court and thus shall regulate the procedures of its own.⁹⁷ Despite this fact the Courts of law have been in a position to give guidelines on the procedures particularly when there is a sign of miscarriage of justice in the course of exercising the powers of the tribunal.⁹⁸ In this case above, Dr. Bwana, J.A had this to say, ‘...*We are alive to the fact that under Section 15 of the Ward Tribunals Act, Cap. 206 R.E 2002 The Ward Tribunals are not bound by any rules of evidence or procedure applicable to any court...however, the procedure before the Ward Tribunal, in our considered view contain several irregularities which would warrant retrial*’...p.4

This brings in the concept that the proceedings are not absolutely governed by the tribunal alone but also the best interest of justice.

On the other hand in the course of executing its functions the Tribunal shall be guided by the principles of natural justice where the statements of witnesses produced by parties to a complaint are heard and relevant document produced by any party are dully examined.⁹⁹

Furthermore, the Tribunal must seek to do justice in order to maintain peace and harmony within the locality. That is why the Tribunal must give equal opportunity to each party to explain his part of the matter and to present his witnesses without any chances of bias either from the members of the Tribunal themselves as interested parties to the subject matter or any kind of bias.

From both positions of the Laws governing the Tribunal, that is the Ward Tribunal Act and Act No.2 of 202, the Court is vested with triple sides of exercising its functions. The *first* side comes in when the Ward Tribunal sits as *mediating body*.¹⁰⁰ By virtue of this power, the Ward Tribunal is vested with duty to secure peace and harmony within the locality by mediating the parties to settle their land matter amicably. The Tribunal in that capacity is vested with powers to deal with all matters that arise from both the Land Act and the Village Land Act. The composition of the Ward Tribunal when sitting for mediation shall consist of three members of whom at least one shall be a woman.¹⁰¹ In this instance the Chairman shall select all the three members including the convener who shall also preside at the meeting of the Tribunal. The presiding chairman shall have a casting vote in case of equal votes.¹⁰² This was, as well a judicial position of the Court of record in the case of *Juliana Kiyeyu Vs Said Mpewa*,¹⁰³ provided for the right quorum of the Ward

⁹⁶ See Section 4 of Cap.206 R.E 2002

⁹⁷ See Section 15 *ibid*

⁹⁸ *William Stephen Vs Ms.Leah Julius(Administratrix of estate of the late Neeva Saboro*, Civil Appeal No. 65 of 2013, Court of Appeal of Tanzania at Arusha

⁹⁹ See Section 15 of Cap. 206 R.E 2002

¹⁰⁰ See Section 13 of Act No.2 of 2002

¹⁰¹ See Section 14 *ibid*

¹⁰² See Section 14 *supra*

¹⁰³ *Juliana Kiyeyu Vs Said Mpewa* Misc. Land Case Appeal No.31 of 2012 High Court of Tanzania (Land Division)at Iringa p.5, See also the case *Halmashauri ya Walei Parokia ya*

Tribunal on mediation as the Chairman, three members, the Secretary and the Convener.

The second side of the tribunal is when the matter is placed to it as a court of original jurisdiction on land. This is what is termed as *hearing and deciding* the matter in dispute as a court per se. It happens when the Tribunal fails to mediate the parties. Then it transforms itself from a mediating instrument by just changing the composition of the quorum. The court must be composed of not less than four members and not more than eight members of whom three shall be women.¹⁰⁴ This quorum has been distinguished from the above instance when the Tribunal sits as a mediating body. In the case of *Joseph Kitango Vs Paulina*,¹⁰⁵ the court revealed the position on what should constitute a ward tribunal when it sits to try the matter and decide on it as a court of original jurisdiction. It reiterated the position of Section 11 of Act No. 2 Of 2002. It has added a mandatory requirement in the course of interpretation that the names of the parties as to distinguish them from males and females must be shown as to ascertain whether the quorum was complete.¹⁰⁶ In other cases failure to mention the names of the members who constituted the quorum has rendered the entire proceedings at the tribunal a nullity. This reveals the seriousness and the relevance of having a properly constituted quorum at this level.¹⁰⁷ In the course of entertaining the subject matter, the Tribunal is vested with pecuniary jurisdiction of not more three Million.¹⁰⁸

Despite all this express provision from the law regarding the pecuniary jurisdiction of the Tribunal, various issues have arisen on the jurisdiction of the Ward Tribunal when the subject matter may seem exceeding the jurisdiction of the Tribunal but there is no valuation report to establish it. In the case of *John Malombola Vs Remmy Kwayu*,¹⁰⁹ Mansoor J. held among other things that the value of the premises cannot be established in the absence of a valuation report. There is a litany of cases to this position which seem to cause hurdles to those who cannot engage valuers at a village level.¹¹⁰ The corner stone of the argument in

the cited cases is that no person can evaluate the property in dispute by mere speculation.

The last side of the Ward Tribunal when exercising its duty, is when it sits as a reference Court. This has different source. It emanates from the provisions of Village Land Act under Section 61 of the Act. In case the Village Land Council has failed to mediate the parties in terms of land sharing arrangement between the pastoralists and the farmers or where there is a dispute on joint village land use agreements between villages.¹¹¹ Such instances have happened in the dispute between the Farmers and the Pastoralists over the Mgongola Basin in Mvomero.¹¹² In such cases where the Village Land Council has not been able to resolve them, a reference is made to the Ward Tribunal. But it is a surprise that in the case of Mgongola basin commonly known as Kwaboga within Kambala village in Mkindo Ward in Mvomero, the case has been different.¹¹³

A reference to the Ward Tribunal is instituted by making of a complaint to the secretary of a Tribunal, the Secretary of an appropriate authority, the Chairman of a Village Council or a ten-cell leader which either be made orally or in writings. When the complaint is in writings shall be signed by the Complainant. In case a complaint is made to any person, that person shall, if he is not the Secretary of the Tribunal, cause it to be submitted to the Secretary of the Tribunal who shall enter it in the records of the Tribunal and arrange for it to be heard and determined by the Tribunal in accordance with the procedure of the Tribunal for the hearing and determination of disputes submitted to it.¹¹⁴

Depending on the matter in dispute that has been brought to the tribunal for trial emanating from a civil nature, the Tribunal has powers to order recovery of possession of land, order the specific performance of any contract, make orders as in nature of injunction, award of any amount claimed, award compensation, order payment of any costs or any orders as the best of interest deems it right.¹¹⁵ It is very important to note here that once the Ward Tribunal has issued any award or order or judgment, it is not empowered to execute it. The power to execute the decree issued by the Ward Tribunal is vested to the District Land and Housing Tribunal within a given locality.¹¹⁶

Matembwe Vs Petro Kitalula, Misc. Land Case Appeal No. 29 of 2010, High Court of Tanzania; See also the case of *Jne Kisonga Vs Said Mohamed Land Appeal No. 59 of 2009*, High Court of Tanzania(Land Division) at Dar Es Salaam

¹⁰⁴ See Section 11 of Act No.2 of 2002

¹⁰⁵ *Kitango Vs Paulina*, Misc. Land Case Appeal No. 26 of 2008, High Court of Tanzania (Land Division) at Iringa

¹⁰⁶ See p. 5 supra; See also the case of *William Stephen Vs Ms. Leah Julius (Administratrix of estate of the late Neeva Saboro*, Civil Appeal No. 65 of 2013, Court of Appeal of Tanzania at Arusha

¹⁰⁷ See the case of *Nahodha Mpaka Vs Agatha Zombe*, Land Appeal No. 1 of 2005, High Court Of Tanzania, at Songea p.2

¹⁰⁸ See Section 15 of Act No.2 of 2002

¹⁰⁹ *John Malombola Vs Remmy Kwayu* Misc. Land Appeal No. 91 of 2009, High Court of Tanzania(Land Division), at Dar Es Salaam

¹¹⁰ See also the case of *Zaidi Baraka Vs Engen Petroleum (T) Ltd*, Land Case No. 135 of 2004, High Court of Tanzania(Land Division); See also the Case of *Lweshabura Mzinja Vs Julieta Jacob*, Misc. Land Appeal No. 7 of 2005, High Court of Tanzania

¹¹¹ See Section 17 of Act No. 2 of 2002; See also Section 11, 58, 61 and 62 of Cap. 114 R.E 2002

¹¹² See Legal and Human Rights Center, *Tanzania Human Right Report* of 2013 issued by the Legal and Human Right Center in March 2014, p.156-161: In this instance the the farmers and the pastoralists are conflict of ownership and the usage right of the basin situated in Kambala Village in Mvomero, Morogoro for a number of years now. Pastoralists normally have been using the land in dispute for grazing cattle every season after harvest of farmers produce. By 2013, the farmers have prevented the pastoralists to use the land even after the farmers had harvested their crops. Thus a dispute over that land.

¹¹³ See the case of *Kambala Village Council Vs Jaribu Mwishehe and 19 Others*, Application No. 127 of 2005, In the District Land and Housing Tribunal for Morogoro at Morogoro, issued on 02/06/2015

¹¹⁴ See Section 11 of Cap 206 R.E 2002

¹¹⁵ See Section 16 of Act No. 2 of 2002

¹¹⁶ See Section 16(3) *ibid*

It has been well provided for, that the Advocates have no audience at the Ward Tribunal. It keeps a legal right of representation reserved only for any relative or any member of the household of either to the proceedings to appear on that behalf.¹¹⁷ An appearance by such party, is only acceptable when it is done at the desire of the interested party to the dispute. In case it is a body corporate, the Director or any authorized person on that behalf is availed with a right to appear.

It is well recognized that a right of appeal is one of the Constitutional rights at the Ward Tribunal.¹¹⁸ This right is vested to the District Land and Housing Tribunal within the locality. The time for such an appeal is within forty five days from the date the decision was passed by the Ward Tribunal. For the best interest of just and upon advancing good reason for delay, this time may be extended.¹¹⁹

c) The District Land and Housing Tribunal

This is established under the laws of the Tanzania.¹²⁰ It is vested with territorial jurisdiction which enables it to operate in a District, Zone or Region within which it is established. This is seen in Morogoro where the entire region is with only three tribunals situated at Ifakara, Kilosa and Morogoro Urban Districts. While in Tanga there are only two Tribunals situated at Korogwe and Tanga Urban area, meanwhile in Mbeya there are only three Tribunals situated at Rungwe, Kyela and Mbeya Municipality.¹²¹ That being the case the territorial operation of the Tribunal depends on the availability of the said Tribunal within a Region or Zone. In Tanzania today there are only fifty District Land and Housing Tribunals.¹²² Currently they are embedded with almost 32,375 disputes before them. As per the Government Notice 545 of 2016, other 47 District Land and Housing Tribunals have been established but are not in force yet. The tribunal is vested with pecuniary jurisdiction at a tune of forty and fifty Million Tanzanian Shillings for a movable and immovable property respectively.¹²³ It is also vested with powers to deal with land matters touching the Public Corporations particularly where there is no High Court within the locality.¹²⁴ The language of the tribunal for this matter is either English or Kiswahili but the records, judgment as well as the decree are reduced down in English.

The Tribunal is composed of the Chairman and the two assessors at the hearing though each tribunal must have at least

seven Assessors.¹²⁵ There shall be the Registrar and Assistant Registrar of the Tribunal who shall be appointed by the President. The Registrar is empowered to deal with administrative issues and shall be the Chief Executive of the Tribunal.¹²⁶ It is trite principle of law that the assessors are required to give their opinion before the chairman gives an award.¹²⁷

The tribunal is vested with five major tasks when dealing with administration of justice over the land disputes. It operates as a court of original jurisdiction to entertain the subject matter in dispute, it is an appellate body, a revising body, and an executing body of its own decision and the decision issued by the Ward Tribunals.

The tribunal is vested with powers to deal with any subject matter in dispute over land as a Court of *first instance*. It is well documented that the Tribunal shall be guided by the jurisdiction within which it can exercise its functions.¹²⁸ In the course of hearing, the right to legal representation is well established.¹²⁹ The Advocates are vested with audience within the tribunal as well as any recognized agent of any interested party. The proceedings are conducted in public and the Tribunal is bound to issue the decision timely for the best interest of justice. In case any party to the proceedings is aggrieved by the decision of the Tribunal a right to appeal is availed within sixty days from the date the judgment was issued.

On the other hand, the Tribunal is vested with powers to sit as an *appellate body*. This capacity falls in two categories. The first emanates from the decision of the Ward Tribunal and the second is the decision of the Village Land Council under Section 55(5) of the Village Land Act.

The tribunal is properly constituted on appeal when a presiding Chairperson entertains it with not less than two assessors. In order to attain the proper ends of justice in respect to the appeal, the tribunal may rely on the records present before it from the Ward Tribunal. If it deems it right, additional evidence may be received. But furthermore, the tribunal is permitted to make inquiry as it deems right in relation to the appeal brought before it. Each party to an appeal may be represented by an Advocate or any recognized agent. It is well settled that the reliefs sought on appeal may include confirmation of the decision of the Ward Tribunal, reversing and or varying the decision, quashing the decision or an order for trial *denovo*.¹³⁰ When the Tribunal issues an order for trial *denovo*, the direction on how to deal with defect may be shown.

The tribunal is also vested with revisionary powers.¹³¹ The tribunal may call for records of the Ward Tribunal for the purpose of examining the records of any proceeding thereto. The

¹¹⁷ See Section 18 *ibid*

¹¹⁸ See Article 12(6) (a) of Cap 2 R.E 2002

¹¹⁹ See Section 19 and 20 of Act No. 2 of 2002.

¹²⁰ See Sections 22 *ibid*, Section 167 of the Land Act and Sections 62 of the Village Land Act

¹²¹ See the Speech of the Minister for Lands, Housing and Settlement Development issued in May 2016 before the National Assembly when debating on the Annual Budget, Table No. 7A annexed to the speech on pp.118 to 120

¹²² See the Speech of the Minister for Lands, Housing and Settlement Development issued in May 2016 before the National Assembly when debating on the Annual Budget, pp.31, See also Table No. 7A annexed to the speech on pp.118 to 120

¹²³ See Section 33(2) of Act No. 2 of 2002

¹²⁴ See Sections 37(2) as amended by Written Laws (Miscellaneous Amendments) (No.2) Act No 11 of 2005

¹²⁵ The Chairman is appointed by the Minister for Lands while the the Assesors are appointed by Minister after consultation with Regional Commissioner. See Section 26 of Act No. 2 of 2002

¹²⁶ See Section 28 *ibid*

¹²⁷ See the case of *Neli Manase Foya V Damianian Mlinga Civil Appeal No. 25 of 2002 CAT* at Arusha

¹²⁸ See Sections 22 and 33 of Act No. 2 of 2002

¹²⁹ See Section 30 *ibid*

¹³⁰ See Section 35 of Act No. 2 of 2002

¹³¹ See Section 36 *ibid*

intention is to justify on the justiceability of it in terms of consistency to the Parent Act or any subsidiary legislation and whether it does not conflict the rules of natural justice. In exercising revisionary powers the tribunal may invoke the powers vested to it on appeal. This position is line with decision of the Court of record in the case of *Nahodha Mpaka Vs Agatha Zombe*.¹³² That being the case the quorum which constitutes the tribunal on appeal applies mutatis mutandis to revision. Though at this level, these Courts are with different Registrars and on different Ministries as quasi judicial bodies as above articulated. The chain of command here is not upright as to reveal a smooth operation of these two bodies.

The Tribunal is lastly vested with powers to execute its order and the orders of the Orders of the Ward Tribunal. It is important to note here that the Ward Tribunal cannot execute the decree of its own such powers are vested to the District Land and Housing Tribunal.¹³³ On the same reasoning the Tribunal is vested with powers to execute its own orders and decree.¹³⁴

d) The High Court Tanzania

This study deals with the High Court generally and not The High Court (Land Division) per se. This is because, the High Court of Tanzania (Land Division) is no longer vested with exclusive jurisdiction to entertain land matters.¹³⁵ These powers are also vested to the High Court of Tanzania (Main Registry).¹³⁶ It is on this regard that the Courts that have been left with exclusive jurisdiction on land matters are only the Village Land Council, The Ward Tribunal and the District Land and Housing Tribunals in Mainland Tanzania. Any High Court of Tanzania is established by the Constitution of the United Republic of Tanzania.¹³⁷ The jurisdiction of the High Court in a special power may be vested to the Court by the statutory law.¹³⁸ In this case the statutory powers of this High Court derive from the Courts (Land Dispute Settlement) Act.¹³⁹ The same force and validity emanates from the Land Act and the Village Land Act.¹⁴⁰ In exercising its powers under the law the Court has various obligations. It is a Court which entertains matters of which it has original jurisdiction, appeals from the District Land and Housing Tribunal, revisionary and supervisory powers and it executes its own orders.

When the Court sits as a Court of original jurisdiction, it is empowered to deal with all subject matters of land nature whose pecuniary jurisdiction exceeds fifty and fourty million shillings

¹³² See also Section 36(2) See also *Nahodha Mpaka Vs Agatha Zombe*, Land Appeal No.1 of 2005, High Court of Tanzania, at Songea;

¹³³ See Section 16(3) of Act No.2 of 2002

¹³⁴ See Section 33(3) *ibid*

¹³⁵ See Written Laws (Miscellaneous Amendments) Acts, No.2 of 2010

¹³⁶ See Sections 17,19, 21, 35 and 36 *ibid.*;

¹³⁷ See Article 108(1) of Cap. 2 R.E 2002

¹³⁸ See the case of *Fahari Bottlers Ltd and Another Vs The Registrar of Companies and Another*, Civil Revision No. 1 of 1999 CAT at Dar Es Salaam (Unreported)

¹³⁹ See Section 3 and 37 of Act No. 2 of 2002

¹⁴⁰ See Sections 167 of Cap. 113 R.E 2002 and 62 of the Cap. 114 R.E 2002

for immovable and movable property respectively.¹⁴¹ In all proceedings involving the Public Corporations and other matters relating to the National Interests as the Minister for Lands may publish in the gazette, touching land shall be dealt with by the High Court in its status as a Court of original jurisdiction. Despite this right position but still the District Land and Housing Tribunals may deal with land matters touching the public corporations in special circumstances. These include within the locality where there is no High Court.¹⁴² On the same circumstance the High Court is vested with mandate in all the proceedings relating to land but where there is no specific Court that has been vested with such powers.¹⁴³

The High Court on the other hand function as an appellate Court in case a party to the proceedings is aggrieved by the decision of the District Land and Housing Tribunal. It provided that an appeal is a right which has to be exercised within sixty days from the date of judgment.¹⁴⁴ It is the discretion of the Court to enlarge time upon advancing a good cause or for the best interest of justice. The appeal to the High Court is lodged to the Court whose decision is to be challenged by way of petition.

The appeals that originate from the proceedings that emanated from the Ward Tribunal must contain the petition of appeal, record of the proceedings, the judgment and the decree and the same must be presented at the High Court by the Tribunal within fourteen days from the date of filing the petition. In this instance, the High Court shall sit with two assessors. Where there is any issue basing on customary law, the High Court may refer the said matter to the Expert or panel of experts,¹⁴⁵ though their decision may not bind the judge to his decision on appeal.

In ordinary appeals from the District Land and Housing Tribunal where original jurisdiction was exercised, the Judge will sit alone to determine an appeal. The decision may thereof be confirmed, reversed, amended, varied in any manner or may take or certify for additional evidence.¹⁴⁶

The same powers on appeal are also vested to the High Court when exercising powers to revise the decision of the District Land and Housing Tribunal. For that matter the High Court Judge sits to ascertain the legality, appropriates and correctness of the Tribunal's decisions.

The High Court when act as a supervisory body, may call for records, inspect them and give directions to the Tribunal. It may call upon any proceedings from the subordinate tribunals either suo motu or upon application by any interested party for directives and correction of errors if any. The decision given thereof obtains force and validity as if the powers were exercised

¹⁴¹ See Section 37(a)and (b) of Act No. 2 of 2002

¹⁴² See Section 37(2) of Act No.2 of 2002 as amended by the Written Laws (Miscellaneous Amendments)(2)Act No.11 of 2005; See also Mirindo, F., (2014), *Administration of Justice in Mainland Tanzania*, 1st Ed. Law Africa, p.145

¹⁴³ See Section 37(e) of Act No 2 of 2002

¹⁴⁴ See Section 38(1) *ibid*.

¹⁴⁵ See The 4th Schedule of the Magistrate Courts Act, Cap 11 R.E 2002

¹⁴⁶ See Section 41 of Act No. 2 of 2002

on appeal.¹⁴⁷ In case any party is aggrieved by the decision of the High Court in any instance, may appeal to the Court of Appeal of Tanzania upon seeking leave from the High Court.¹⁴⁸ If turns out that the High Court has refrained from granting leave to the applicant, then the next avenue to the aggrieved party is to access the Court of Appeal of Tanzania by a second bite. This is done within fourteen days from the date of refusal.¹⁴⁹ It is a trite principle of law that a rejected application for leave by the High Court cannot be challenged by revision, reference or appeal. Various cases have supported this position.¹⁵⁰

On the other hand, the High Court is vested with powers to execute the decree of its own. At the same time when the Court deems it right may order execution of the decree to be effected by the another court subordinate to it.¹⁵¹ For the purpose of administrative operations, the High Court of Tanzania and the Court of Appeal are under the Ministry of Constitution and Legal Affairs.

e) The Court of Appeal of Tanzania

This is the supreme Court in Tanzania and it is established under The Constitution.¹⁵² The laws vests this Court with powers to determine appeals on land matters.¹⁵³ It is a trite principle of law that the Court of Appeal of Tanzania is governed by separate laws in conducting its proceedings. It is governed by the Appellate Jurisdiction Act,¹⁵⁴ and the Court of Appeal Rules 2009. The Court is also empowered like any other land Courts to apply laws as they are elaborated under the Land Act.¹⁵⁵ In all land matters any person aggrieved by the decision of the land Courts must seek leave in order to appeal to the Court of Appeal.¹⁵⁶ When leave is reject by the High Court then leave has to be sought to the Court of Appeal as a second bite.¹⁵⁷ But in all matters which originate from the Ward Tribunal and appeal is then preferred from the third appeal, the applicant shall be required to seek a certificate from the High Court certifying the existence of the point of law involved on appeal.¹⁵⁸

There are basic requirements for the appeal to be preferred at the Court of Appeal. The First thing is the notice of appeal

within thirty days from the date of the decision and the same has to be lodged with the Registrar of the High Court and one copy out of the triple copies shall be filed to the relevant registry.¹⁵⁹ The notice must be in the prescribed form.¹⁶⁰ The process of filing of a notice has nothing to do with seeking of the leave or seeking for a certificate on the point of law. Each has its own avenue in the course of proceedings. It is the notice that states whether an appeal is against the whole judgment or part of it. The notice must be served to the Respondent within fourteen days from the date of filing it. The second requirement is application for leave or certificate on the point of law as the case may be. In case all dully done as per the law there follows a step of instituting an appeal. The memorandum of appeal, security for cost and the record of appeal must be filed within sixty days from the date of filing the notice.¹⁶¹ For the best interest of justice, the Court of Appeal may order after satisfying itself that the party is unable to deposit prior the security for costs, allow the appeal to filed without depositing security for costs.¹⁶² The memorandum of appeal and its record of appeal shall be served to the Respondent within seven days from the date of filing.¹⁶³ Presentation of written submission follows the event.¹⁶⁴ When all this is successful, in case there are Preliminary Objections, three clear day notice must be given to either party before a hearing date.¹⁶⁵ If the same is dully served, the Court shall entertain it or adjourn the matter in favour of another date for determining the objections.

A notice of not less than fourteen days shall be given to the parties summoning them for hearing of an appeal.¹⁶⁶ The judgment shall be then pronounced.¹⁶⁷

The Court of appeal is also vested with powers to revise the proceedings of the High Court when performing the functions as a land Court. Revisional powers of the Court may be done suo motu or by an interested party to the proceedings.¹⁶⁸ The Court is moved by a notice of motion and an affidavit. There is no requirement for annexing any other document to the application. It is clear therefore, that when the matters have been initiated by the Court suo motu only a notice to be issued by the Court to the parties is required. In the course of exercising the revisionary powers the Court of Appeal direct as if it is sitting on appeal.

The Court is also vested with review powers of its own decision. This remedy is entertained in a very limited way. Rule 66,¹⁶⁹ provides for the instance which attract this remedy. These include the instance when the decision was based on a manifest error on the face of the record resulting in the miscarriage of

¹⁴⁷ See Section 43 *ibid*.

¹⁴⁸ See also the case of *Dero Investment Ltd Vs Heykel Berete*, Civil Appeal No 92 of 2004, CAT at Dar Es Salaam (Unreported). This case supported the position of Section 47(1) of Act No. 2 of 2002

¹⁴⁹ See Rule 45(b) of the Court of Appeal Rules, 2009

¹⁵⁰ *Njeru Mulugula Vs Sander Samson Sanga and Another*, Civil Application No. 4 of 2002, CAT, at Mbeya (Unreported), *Manoharlal Aggarwal Vs Tanganyika Land Agency Ltd and 8 Others*, Civil Reference No. No.11 CAT, Dar Es Salaam(unreported); See also *Auguster Salanje Vs Mussa Pemba* (1992) T.LR 62

¹⁵¹ See Section 34 of the Civil Procedure Code, Cap.33 R.E 2002 as it applies in accordance with Section 51 of Act No.2 of 2002

¹⁵² See Article 117 of Cap. 2 R.E 2002

¹⁵³ See Section 48(1) of Act No. 2 of 2002

¹⁵⁴ Cap. 141 R.E 2002

¹⁵⁵ See Section 180 of the Land Act, Cap. 113 R.E 2002

¹⁵⁶ See Sections 47(1) of Act No. 2 of 2002, See also Section 5(2) of the Cap. 141 R.E 2002

¹⁵⁷ See Section 5(1) (c) of Cap. 141 R.E 2002

¹⁵⁸ See Section 5(2)(c) of Cap. 141 R.E 2002

¹⁵⁹ See rule 83 of the Court of Appeal Rules

¹⁶⁰ Form D as it is in the Schedule of the Court of Appeal Rules, 2009

¹⁶¹ See Rule 90 of the Court of Appeal Rules 2009

¹⁶² See Rule 128 *ibid*

¹⁶³ See Rule 97 *ibid*

¹⁶⁴ See Rule 106 *ibid*

¹⁶⁵ See Rule 107 *ibid*

¹⁶⁶ See Rule 108 *Supra*

¹⁶⁷ See Rule 116 *ibid*

¹⁶⁸ See Section 4 of the Appellate Jurisdiction Act Cap. 141 R.E 2002

¹⁶⁹ Court of Appeal Rules, 2009

justice; when a party was wrongly deprived of an opportunity to be heard;

When the court's decision is a nullity; the court had no jurisdiction to entertain the case; or the judgment was procured illegally, or by fraud or perjury.

The application for review applies in the same manner as it is to revision save that review is done by the same Court which issued the order or judgment as the case may be and within sixty days from the date of the order or judgment. The Court is moved by the notice of motion. The decision issued thereto is final and conclusive.

It is also well established that The Court of Appeal may sit as a Court of reference unto the matter that emanate from its own decision. It is governed by Rule 62 of the Court of Appeal Rules. The takes place when a decision of a single Justice seeks to be varied, discharged or reversed. It applies in accordance with Article 123 of the Constitution of the United Republic of Tanzania.

IV. INNACCESSIBILITY TO LAND DISPUTE SETTLEMENT MACHINERIES

In this context the concepts of accessibility *visa vis* inaccessibility to justice have been well documented.¹⁷⁰ The same Constitution has been able to show in what style and mode to those who desire to access justice should be treated and the right position where procedural technicalities give way to substantive justice.¹⁷¹ There is a litany of cases where judicial interpretation of the above principle has been laid down.¹⁷² In this case, it was held among other things that,

*"...the right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalized mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable."*¹⁷³

Various jurists have also been in a position to elaborate what access to justice in its strict sense means. Access to justice assumes a position that Courts should be open to all persons

whose rights have been affected.¹⁷⁴ Likewise, Maina Peter is of the view that access to justice connotes ability of the aggrieved party to challenge violative actions in Courts of law, accessibility of Courts, and ability of courts to give effective remedies, equal and fair treatment before the eyes of the law.¹⁷⁵ It is therefore a trite principle of law that any person who seems aggrieved of his interest must be able to access the court for the remedy.

With this school of thought, the term Courts in respect to land disputes bears the meaning ascribed to it by the Land Act, 1999. The law provides for the said Courts as Village Land Council, Ward Tribunal, District Land and Housing Tribunal, High Court of Tanzania and the Court of Appeal of Tanzania.¹⁷⁶ In Morogoro Region where this paper focuses, there are various instances which in themselves reveal that inaccessibility to land dispute machineries warrant the endless disputes within the locality.

1.1 Geographical and Distance inaccessibility of the Tribunals in Morogoro:

There is no dispute that Morogoro Region is one of the Regions reported of land disputes in Mainland Tanzania. Morogoro Region consists of seven Districts, that is Ulanga, Marinyi, Kilombero, Kilosa, Mvomero, Gairo and Morogoro District Council.¹⁷⁷ It is only Kilombero, Kilosa and Morogoro Urban which have operating Tribunals. In Kilosa for instance, there are almost 39 Wards and each Ward has a Ward Tribunal. But this Tribunal serves two Districts that is Gairo and Kilosa Districts. But yet still, there is no permanent stationed Chairperson at the Tribunal from the time it was established. The two Chairpersons who serve in Morogoro Urban render service on rotation basis where only two weeks in a month the District Land and Housing Tribunal preside over matters at the Tribunal. Kilombero District has a District Land and Housing tribunal located at Ifakara. It serves three Districts, that is Ulanga, Kilombero and Marinyi Districts while each District has more than thirty Ward Tribunals. There is only one Chairperson stationed at the Tribunal at Ifakara District Land and Housing Tribunal. It is not strange as it is a usual practice that a case to an aggrieved party originating from the Ward Tribunal comes by way of appeal to the District Land and Housing Tribunal. Likewise, a decision on appeal from the District Land and Housing Tribunal is preferred to the High Court of Tanzania situated in Dar Es Salaam, then to the Court of Appeal of Tanzania situated in Dar Es Salaam. There is a litany of cases that in practice, people lodge their cases in such Tribunal but end up in despair despite such a long distance to access justice. In the case of *Twaibu Mselemu Vs Ally Omary Madenge*,¹⁷⁸ the case

¹⁷⁰ See Article 13(3) and (6)(a) of Cap.2 R.E 2002

¹⁷¹ Article 107A(2) (e) supra

¹⁷² *The National Housing Corporation Vs Etienes*, Civil Application No. 10 of 2005, CAT at DSM (Unreported) ; *DT. Dobie (T) Ltd Vs Phantom Modern Transport (1985) Ltd*, Civil Application No. 141 of 2001, CAT (Unreported) ; *Julius Ndyanabo Vs AG*, Civil Appeal No. 64 of 2001, CAT at DSM; *Cropper Vs Smith (1884)* 26 CL.D.700 at p. 700; *General Marketing Co. Ltd Vs A.A.Shariff (1980)* T.L.R. 61 p.65; *Manji Ltd Vs Arusha General Stores (1991)* TLR 165, *Rawal Versus Mombasa Hardware (1968)* E.A 392

¹⁷³ See Julius Ndyanabo case, loc.cit.fn. 172

¹⁷⁴ Mirindo, F., (2014), *Administration of Justice in Mainland Tanzania*, 1st Ed. Law Africa, Dar Es Salaam, p.58

¹⁷⁵ Maina C.P., (1997), *Human Rights in Tanzania: Selected Cases and Materials*, 1st Ed. Rudiger Koppe Verlag.Koln p.306

¹⁷⁶ See Sections 2, 167 of the Land Act, Cap. 113 R.E 2002; See also Section 61 of the Village Land Act, Cap. 114 R.E 2002

¹⁷⁷ Government Notice No. 301 dated 22nd August 2014

¹⁷⁸ *Twaibu Mselemu Vs Ally Omary Madenge*, Misc. Land Appeal No. 106 of 2013, High Court of Tanzania at Dar

was lodged originating from Land Appeal No. 32 of 2013 originating from the decision of the Ward Tribunal of Mofu. It was dismissed for want of prosecution at the High Court of Dar Es Salaam and no consideration was put to how long the parties navigated to prosecute their case from Marinyi, then Ifakara and lastly High Court of Tanzania at Dar Es Salaam.

1.2 Execution of the decree

It is a common practice, that the Court issuing judgment has always been an executing Court of its orders. But it is different from what is taking place at the Ward Tribunals where the Ward Tribunal cannot execute its orders.¹⁷⁹ An application for execution of the decree issued by the Ward has to be executed by the District Land and Housing Tribunal within the locality. In Morogoro, almost every ward has a Ward Tribunal/Court. It becomes cumbersome for instance a person from Utengule Ward travelling the whole way through, almost 100 kilometers to execute a decree at Ifakara District Land and Housing Tribunal in Kilombero. Likewise a person moving from Uleling'ombe Ward travelling almost 100 kilometers to execute a decree at Kilosa District Land and Housing Tribunal, a Court which does not have a stationed Chairperson from its commencement. In most cases, a person has to undergo ordinary court procedures for executing a decree which include lodging an application, securing summons and serving them, attending the session and sometimes finding a Chairman who is a single presiding Chairman adjourning the matter possibly for site visit or illness or sometimes for official duties. Furthermore, the decree intended to be executed emanates from Swahili language, which is the language of record at the Ward Tribunal though an application for execution has to be lodged in English language as the language of record at the District Land and Housing Tribunal. Most of the villagers have to invoke an expert to fill in the application but it is as well such hard for them to argue on the application which is reduced down in English basing on technical wording with legal jargons. Execution is not only hard to ordinary people but to the legal practitioners as well.

To the practitioners it may be easier because it is part and parcel of their duties, but to ordinary people it sounds an embarrassment which in itself may lead to a despair and mistrust to the Courts of law.

1.3 Appeal to the District Land and Housing Tribunal from the Village Land Council and leave seeking process

This position seems truly unusual to ordinary Court practice.¹⁸⁰ Village Land Council receives appeals from the Village Adjudication Committee.¹⁸¹ Now a person aggrieved by the decision of the Village Council has to prefer an appeal to the District Land and Housing Tribunal as per obligation of the Village Land Adjudication Committee. Despite this position, but yet one may raise a question on why should an appeal be

Es Salaam. See also the case of *Venance Mwageni and 40 Others Vs Zaveda Chelele* Land Appeal No. 50 of 2015, High Court of Tanzania at Dar Es Salaam, a case was filed at the High Court of Dar Es Salaam from Ulanga/Kilombero/Marinyi

¹⁷⁹ See Section 16(3) of Act No. 2 of 2002

¹⁸⁰ The matter comes from the lower court following the hierarchy of the Court process.

¹⁸¹ See Section 55(1) of the Village Land Act, Act No. 5 of 1999

preferred to the District Land and Housing Tribunal without being preferred to the Ward Tribunal as per ordinary court hierarchy. But furthermore, in Morogoro Region there are almost 665 Villages,¹⁸² whereas only three District Land and Housing Tribunal are in place with a backlog of ordinary cases lodged thereto of not less than 1000 cases pending in each Tribunal. Adding cases of the like from the Village Land Council on appeal may create unnecessary problems to the people than it is if the Ward Tribunal was skipped on this procedure.

Under this trend which seems unusual to ordinary court processes, there is a requirement for leave seeking if an aggrieved party intends to appeal from the Village Land Council to the District Land and Housing Tribunal. There is no regulation set forth on how villagers can move the Court to obtain the redress and within what time.¹⁸³ It is obvious, that these villagers will move miles to access the District Land and Housing Tribunal and yet will have to undergo such technical procedures which shall require them to seek for an expert let alone moving to seek for such experts whom most of them are centered in towns and cities than it is to villages.

4.4. Emoluments of the Personnels to the Land settlement Machineries

The Village Land Council and the Ward Tribunal have always been the Courts of the first instance at a village level. All these bodies are under the Prime Minister's Office, Ministry of Regional Administration and Local Government and as such are responsible to the Registrar of Villages administratively.¹⁸⁴ From experience point of view, it has been observed that the members of these bodies do not have a formal payment from Government. It is a work accompanied with volunteering. It is surprising to see that the Courts of the instance do not have formal payments. It may sometimes, though not always, compromise the impartiality of these Courts of first instance. Various jurists have overemphasized that for the proper operation of the judicial and quasi judicial bodies, they must be paid salaries which are adequate to their responsibilities in order to get rid of temptation to bribery and corruption.¹⁸⁵

Now, the contributions effected by the litigants in the course of filing the Complaints and site visiting have been the source of self redress to the members of these courts. Any person would wonder what would happen if either party does not contribute or he is not in a financial position to give such contributions to the Courts. It is emphasized that these personnels must be adequately paid but in the instance at hand there are no payments at all save as above said. Seemingly and more often,

¹⁸² See Government Notice No. 301 of 22/8/2014

¹⁸³ See Section 55(5) of Act No. 5 of 1999

¹⁸⁴ See Section 6 of Act No.2 of 2002; See also Section 23 of Cap. 287 R.E 2002

¹⁸⁵ Mfalila L., 'Twenty Five Years of the Court of Appeal and the Independence of the Judiciary' an article published in a book edited by Hellen K.B and Maina, C.P., (2007), *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal of Tanzania*, 1st Ed. Mkuki na Nyota Publishers, Dar Es Salaam, p.83

people have been resorting to 'self help' than it is to these courts.¹⁸⁶

1.4 Controversy in Administrative Command as per Court Hierarchy

These Courts set to administer justice on land matters possess an hierarchy which administratively and on quasi judicial capacity create a contradictory point on who commands who in the entire process of justice administration on land matters. That is to say, The Village Council and the Ward Tribunal are subject to the Prime Minister's Office, Ministry of Regional Administration and Local Government with their independent Registrar. Meanwhile the District Land and Housing Tribunal is under the Ministry of Lands, Housing and Settlement Development with its own Registrar.¹⁸⁷ On the other hand, the High Court of Tanzania and the Court of Appeal of Tanzania are under the Judiciary which falls as a Department to the Ministry and Constitution and Legal Affairs.

There is no provision within any of the laws that gives express directives to these bodies in case of administrative order. The District Land and Housing Tribunal for instance may not legally give order to the Ward Tribunal without addressing the same to the Registrar of the Wards. Therefore there is no direct responsibility accommodated to these bodies as it is to ordinary Court hierarchy without a third party approval. In this case, the Registrar of the High Court of Tanzania has to communicate to the Registrar of the District Land and Housing Tribunal in case of any judicial function of the Court. Otherwise, the Chairman of the District Land and Housing Tribunal may refrain from receiving that order since the High Court of Tanzania is not an immediate supervisor hierarchically. There may arise some instances where the District Land and Housing Tribunal orders for immediate submission of the Ward Tribunal file, but the Chairperson hesitates or protects himself of having the file lost and yet no action is taken by the District Land and Housing Tribunal on the above given reason. People may be aggrieved and thus resort to alternative way which may not attract the ear of reasonable person.

1.5 Security of Tenure to the Tribunal Personnels

It is a trite principle of law that any instrument administering justice must be seen to be impartial. It must be independent for the better administration of justice. This includes security of tenure to the personnels exercising these duties and the institution itself.¹⁸⁸ The rationale for having an independent

body whose office is secured is not far to trace. Justice, Mfalila Lameck, (as he then was) puts it briefly that,

'...it may bring them into conflict with those in authority in the state. That is why it is of the highest importance that judges should be independent and impartial.they stand between the individual and the state protecting the individual from any interference with his freedom which is not justified by law. In order to be independent and impartial, they must be[able to] survive in their office. They must not be liable to be removed at the pleasure of the Government...'¹⁸⁹

The law governing and establishing these bodies has not set any clause either, protecting this avenue which is a key stone to rule of law. For instance, what is seen on record is the appointment of the Chairman of the District Land and Housing Tribunal by the Minister responsible for lands but nothing is revealed to protect the said interest after the appointment. It is not well established in what manner the appointed Chairman can withstand the penalty, inducement, threat by the appointing body in the entire process which may be seen as influencing factor to the decision issued by the Chairman. It is shown only under the Regulations that in case the Minister intends to remove the Chairman from office, may conduct an inquiry.¹⁹⁰ There is no mandatory requirement for removal which is imputed to the Minister in establishing an inquiry under Section 18 of the Land Act. It is rather discretionary with using 'may' and not 'shall' wording. It does not give a conclusive position that the Minister is bound by the findings of the Inquiry in the course of removing the Chairman. This means the Chairman works and gives decisions at the pleasure of the Minister who is also a renewing master of his tenure. He cannot be confident of not being punished by giving what the executive feels is a wrong decision.¹⁹¹ This in itself may be a sign of a compromised impartiality which may lessen confidence to these bodies particularly when it is land conflict between the government and its people. The position is the same to the Ward Tribunal and the Village Land Council save for the High Court of Tanzania and the Court of Appeal of Tanzania where security is well documented.¹⁹² These as well are limited in accessibility due to the original jurisdiction thereto of which its jurisdiction has to be established by the valuation report.¹⁹³ Yet its accessibility is questionable in terms of pecuniary jurisdiction in the absence of the valuation report.

Selection of Writings and Speeches, 1st Ed. Oxford University Press, Dar Es Salaam, p. 261 and 131

¹⁸⁹ Mfalila L., loc cit. p. 83

¹⁹⁰ See also section 35 of the Land Disputes Courts(The District Land and Housing Tribunal Regulations, 2003, GN.No. 174 of 27/06/2003

¹⁹¹ Ibid p.86

¹⁹² Article 107B, 110, 120 of Cap. 2 R.E 2002

¹⁹³ See the case of *Lweshabura Mzinja Vs Julieta Jacob, Misc. Land Appeal No. 7 of 2005, High Court of Tanzania*

(*Land Division* –as it then was) at *Dar Es Salaam*, p.3 where it was stated among other things that in the absence of a valuation report, any attempt by any of us to attach the value to the property is nothing but conjectural...we cannot estimate the value of the subject matter on speculation.

¹⁸⁶ See what is taking place in Tindiga Ward in Kilosa; Mkindo Ward in Mvomero through Mwanu groups to mention a few

¹⁸⁷ See Section 28 of Act No. 2 of 2002

¹⁸⁸ See Article 107B and 110 of Cap. 2 R.E 2002; See also Mirindo, F., (2014), *Administration of Justice in Mainland Tanzania*, 1st Ed. Dar Es Salaam, Law Africa (T) Ltd. p.8; See also Mfalila L., 'Twenty Five Years of the Court of Appeal and the Independence of the Judiciary' an article published in a book edited by Hellen K.B and Maina, C.P., (2007), *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal of Tanzania*,

1st Ed. Mkuki na Nyota Publishers, Dar Es Salaam, p.83; See also Nyerere J.K., (1967), *Freedom and Unity: A*

1.6 Position of Assessors and the process of securing them

The Courts of law always sit with assessors particularly at the District Land and Housing Tribunal.¹⁹⁴ The opinion of wise assessors assists the umpire to give his decision. In case he does not accept their opinion reasons shall be advanced. Similarly, it is now a requirement that assessors must sign a judgment as it is to the chairman to show that they agree with the issued judgment.¹⁹⁵ Sitting with assessors for the purpose of this paper is not in dispute. What puts doubt is how the assessors are obtained. The Law provides that, the Minister upon consulting the Regional Commissioner may appoint not more than seven assessors three of whom shall be women.¹⁹⁶ With development of multiparty democracy, the parties to the proceedings may not feel comfortable to present their cases as there might be likelihood of bias by the person who does not belong to the party in power. This is because, the Regional Commissioner of whom the Minister consults in the course of appointing assessors belonging to the ruling party. This is so presumed on a reason that the law does not put it a mandatory requirement as it is to criminal cases for the parties to object to any of the presiding assessors.¹⁹⁷ There is nowhere, it is provided that assessors shall undergo a scrutiny from the grass root of which villagers may through their voices in their respect Districts air their interest in the course of appointing these assessors.

The reason for doubt in this context is not an imaginary thing. *Mirindo* puts it loud that, it is a rule of practice now accepted as part of the procedure for a fair justice administration basing on the right to a fair hearing.¹⁹⁸ It is in such instance deemed a condoning factor to justice.

It is not in dispute that the so properly appointed assessors may not do justice but the principle against bias reasons it out beyond this notion. The case of *R v H.M Coroner for Inner West London ex parte Dallaglio and Lockwood Crof*,¹⁹⁹ it was held by **Simon Brown, LJ**, among other things, that,

“...Injustice will have occurred as a result of bias if the decision-maker unfairly regarded with disfavor the case of a party to the issue under consideration by him’. ‘Unfairly

¹⁹⁴ See Section 26 of Act No. 2 of 2002 See also Regulation 33, 34 of the Land Disputes Courts(The District Land and Housing Tribunal Regulations, 2003, GN.No. 174 of 27/06/2003

¹⁹⁵ See the case of *Neli Manase Foya Vs Damian Mlinga* Civil Appeal No. 25 of 2002 Court of Appeal of Tanzania(Unreported)

¹⁹⁶ See Section 26 of Act No. 2 of 2002

¹⁹⁷ See the case of *Laurent Salu and 5 Others Vs R Criminal Appeal No. 176 of 1996 CAT at Mwanza*(Unreported)

¹⁹⁸ *Mirindo, F.*, (2014), *Administration of Justice in Mainland Tanzania*, 1st Ed. Dar Es Salaam, Law Africa (T) Ltd. p.395; See also the case of *Bundala Mihayo and Another Vs R Criminal Appeal No 137 of 1991 CAT at Mwanza* issued in 1992(Unreported)

¹⁹⁹ *R v H.M Coroner for Inner West London ex parte Dallaglio and Lockwood Crof*, [1994]4 All E.R 139; see also *R V Gough*, A.C. 646

regarded with disfavor’, meant was pre-disposed or prejudiced against one party’s case for reasons unconnected with merits of the case...”

Meanwhile, in Tanzania jurisprudence, it is a settled principle that the rule against bias is well documented. *Kalegeya J*,²⁰⁰ while making reference to *Gough case* (cited herein above), cemented for a test of bias with a principle that justice must not only be done but seem to be done. On the other hand, Fauzi, J, in the case of *Independent Power Tanzania Limited and Another Vs Standard Chartered Bank and 2 Others*,²⁰¹ has set an emphasis that bias is likely to be seen when there is inability to the trial judge to adjudicate without consideration of extraneous matter, prejudices or predilection.

Now, the procedures for obtaining the said assessors seems to condone injustice to the majority on the ground of bias, thus in most cases a self help becomes a remedy than resorting to these Courts. The process of obtaining the assessors to be brief does not emanate from the villagers themselves. It seems imputive. Their security of tenure as well is questionable.

1.7 Procedural Technicalities

In Tanzania it is well settled that rules of procedure are handmaiden of justice and thus must not be used to thwart substantive justice.²⁰² This as well has been the position in the course of administering justice with land settlement machineries. It has gone further that machineries like the Ward Tribunals are not bound by rules of evidence or procedure applicable to any court.²⁰³ However, while it is so accepted, its application has not

²⁰⁰ *CRDB (1996) LTD vs Minister for Labour and Youths Development*, (2000) T.L.R 66; See also *Mahona v University of Dar Es Salaam* (1981) T.L.R 55; See also *Dr. Kalage Vs Esso Tanzania Limited*, Civil Appeal No. 10 of 1982 CAT (Unreported)

²⁰¹ *Independent Power Tanzania Limited and Another Vs Standard Chartered Bank and 2 Others*, Civil Case No. 60 of 2014, High Court of Tanzania at Dar Es Salaam delivered on 27th May 2016; See also *VIP Engineering and Marketing Ltd Vs Standard Chartered Bank PLC and 5 Others*, Civil Case No. 229 of 2013 High Court of Tanzania at Dar Es Salaam and *Luxury Apartment Limited v Edward Wilson Ngwale*, Misc. Civil Application No. 59 of 2013 High Court of Tanzania at Dar Es Salaam; See also the position in *IPTL Vs VIP Engineering and Marketing Limited* (2004) T.R.L 373; *Zabron Pangamaleza Vs Joakim Kiwaraka and Another* (1987) T.L.R 140.

²⁰² See Article 107 A (2) (e) of Cap. 2 R.E 2002; *The National Housing Corporation Vs Etienes*, Civil Application No. 10 of 2005, CAT at DSM (Unreported) ; *DT. Dobie (T) Ltd Vs Phantom Modern Transport (1985) Ltd*, Civil Application No. 141 of 2001, CAT (Unreported) ; *Julius Ndyanabo Vs AG*, Civil Appeal No. 64 of 2001, CAT at DSM; *Cropper Vs Smith* (1884) 26 CL.D.700 at p. 700; *General Marketing Co. Ltd Vs A.A.Shariff* (1980) T.L.R. 61 p.65; *Manji Ltd Vs Arusha General Stores* (1991) TLR 165, *Rawal Versus Mombasa Hardware* (1968) E.A 392

²⁰³ See Section 15 (1) of the Ward Tribunal Act, Cap. 206 R.E 2002, See also Regulation 10 of the Land Disputes

got rid of the use of procedural requirement of the law. In the case of *William Stephen Vs Ms Leah Julius*²⁰⁴ the Court was of the view that,

‘...Substantive justice as enshrines underConstitution of the United Republic of Tanzania does not, in our considered view, do away with the need to observe procedural requirement of the law. Doing so may result in causing injustice...Ignoring such irregularities amounts to condoning injustice...’

To a lay person who is in most cases unrepresented would feel that justice is done if our tribunals are free from legal technical issues in favour of a substantive justice. It is common that a judgment at a ward tribunal is reduced down in Swahili language but its application for execution is lodged at the District Land and Housing Tribunal (DLHT) which often than not is far away from the Ward Tribunal. As if it is not enough, an application for execution and appeals are filled in English. Similarly the law governing these tribunals is reduced down in English as if all the villagers are trained to know and speak English. This barrier may not encourage the litigant or the villagers to access these machineries. Likewise, the proceedings at the DLHT are recorded in English.

It may not be difficult at the Ward Tribunal to access the Court, but in case the subject matter exceeds the jurisdiction of the Court, it is where hardship commences.²⁰⁵ The District Land Housing Tribunal can only be accessed by filing forms in English as they are shown under the Land Disputes Courts (The District Land and Housing Tribunal Regulations, 2003, GN. No. 174 of 27/06/2003. Applications in terms of chambers summons and affidavit are lodged in English and in case of any gap the Civil Procedure Code and the Evidence Act applies.²⁰⁶ This is where technical issues lie and it is doubtful if the same are at the finger tips of the unrepresented persons.

Going by the same logic that legal technical procedures are not allowed, there is no law that has been enacted to guide the litigants from the Ward Tribunal and District Land and Housing Tribunal appealing to the High Court and thereafter appealing to the Court of Appeal. They are subjected to entire Court proceedings under the Appellate Jurisdiction Act and the Court of Appeal Rules, 2009. Through this mechanism, land disputes may not come to a halt. Living example are not far to trace in this sense. In Morogoro Region particularly, Kilosa there has been a disputes which was lodged and finally decided by the Court of Appeal of Tanzania.²⁰⁷ It is very unfortunate and without prejudice to either party, that through this mechanism of settling

Courts(The District Land and Housing Tribunal Regulations, 2003, GN.No. 174 of 27/06/2003

²⁰⁴ *William Stephen Vs Ms Leah Julius* Civil Appeal No. 65 of 2013 CAT at Arusha

²⁰⁵ See 2nd Schedule Forms No. 1,3, of the Land Disputes Courts(The District Land and Housing Tribunal Regulations, 2003,

GN.No. 174 of 27/06/2003

²⁰⁶ See Section 51 of the Land Disputes Courts Act, No. 2 of 2002

²⁰⁷ *Halmashauri ya Kijiji cha Mabwegere Vs Hamis (Shaban) Msabaha and 32 Others*, Civil Appeal No. 53 of 2010 , CAT, Dar Es Salaam

disputes bogged with technicalities the said dispute has not come to a halt. The possibility that the Court did not touch the root of the matter attracts overwhelming chances of success. As if it is not enough, the Government has once again over the same dispute, from 18th July 2016 employed an inquiry over Mabwegere, Mambegwa, Mbigiri, Dumila, Matongolo and Mfulu villages in Kilosa under His Lordship Mwambegele, J, as to ascertain what exactly are the sources and how to go away with these disputes. The report is pending from the date and no right recourse is in place for the past eight months from the appointment.

Another good example, has been in Mvomero within Mkindo Ward where a suit has been lodged at the District Land and Housing Tribunal of Morogoro at Morogoro and has been decided to its finality but yet still the land dispute has not come to at halt. This was the case between *Kambala Village Council Vs Jaribu Mwishee and 19 Others*,²⁰⁸ where later on the Villages of Mkindo, Dihombo, Kigugu and Hembeti joined the proceedings. The applicant’s claim was that Kambala village be declared the sole registered owner of the village suit land and for the order that the Respondents be evicted from the suit land and perpetual prohibition against the Respondents not to invade the suit land. Despite the rue fact from the records that the suit dragged in Court for almost ten years, possibly with good cause, the existing records show that the area in dispute that is bogo suburb, commonly known as Mgongola basin was situated at Kambala village.²⁰⁹The decision of the District Land and Housing Tribunal was issued on 02/06/2015, among other things, nullifying the certificate of village land of Kambala, No. 006 MVDC and ordering for verifying boundaries of the villages and establishment of buffer zone of seventy meters wide to separate the farm land from the pastoral areas through permanent beacons demarcating the area. From the time, the decree was so issue, there was efforts employed by the Applicants to appeal and staying the execution of the decree at the High Court of Tanzania at Dar Es Salaam but the an application for stay was not sustained thus struck out on 03/11/2015. But an appeal is still pending at the High Court of Dar Es Salaam.

Despite having such a dispute dragged in Court for such long, yet disputes over the area have not come to a halt yet. Villagers are still reported to have been in serious fights which at the first instance do not show any greenlight of finally resolving the matter.

V. CONCLUSION

The efforts employed by the Government to make sure that land disputes are settled through right machineries are highly appreciated. However, I am at one with what Mwalimu Nyerere once said at his first inaugural Address to the Parliament in

²⁰⁸ *Kambala Village Council Vs Jaribu Mwishee and 19 Others*, Application No. 127 of 2005 the judgment of which was delivered on 6th day of June 2015

²⁰⁹ See Government Notice No 301 of 22/08/2014

1962 which among other things, emphasized that we cannot hope to solve our problems by pretending that they do not exist.²¹⁰

The land disputes in Morogoro Region are acknowledged to have been in existence.²¹¹ What is important here is to see whether these machineries set-forth to settle these disputes serve the purpose either from the personal angle of an individual exercising this noble duty to Institutional view.

It is not the purpose of this paper to give a conclusive position on whether these machineries may be one of the sources for land disputes or accelerated land disputes but rather highlighting possible issues from the legal point of view that may either thwart accessibility to these machineries in express or implied terms.

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²¹⁰ Nyerere J.K, (1967), *Freedom and Unity: A Selection of Writings and Speeches*, 1st Ed. Oxford University Press, Dar Es Salaam, p.179

²¹¹ See The Inaugural Speech of the sworn in President of the United Republic of Tanzania in November 2015 to the Parliament, Speech of the Minister for Lands, Housing and Settlement Development issued in June 2015/2016, 2016/2017 before the National Assembly when debating on the Annual Budget.

